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In the Supreme Court of the United States

OCTOBER TERM, 1960

THOMAS E. MOSHEIM, PETITIONER

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. 15–22) has not yet been reported.

JURISDICTION

The judgment of the court of appeals was entered on December 23, 1960 (Pet. 23). A petition for a rehearing was denied on January 19, 1961 (Pet. 24). The petition for a writ of certiorari was filed on February 16, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to show that petitioner made a false oath in a bankruptcy proceeding, in violation of 18 U.S.C. 152.

2. Whether petitioner was properly convicted of conspiracy.

STATUTES INVOLVED

18 U.S.C. 152 provides in pertinent part:

> Whoever knowingly and fraudulently makes a false oath or account in or in relation to any bankruptcy proceeding; * * *
>
> Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

18 U.S.C. 371 provides in pertinent part:

> If two or more persons conspire either to commit any offense against the United States, * * * and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

* * * * *

STATEMENT

A four-count indictment returned in the United States District Court for the Southern District of Texas charged petitioner and one Jamail with making, and conspiring to make, a false oath in a bankruptcy proceeding, in violation of 18 U.S.C. 152 and 371 (R. 4–11). Upon waiver of a jury trial (R. 13–14), petitioner was tried by the court and found guilty on the conspiracy count and one substantive count (R. 464, 512). On each of the counts, petitioner was sentenced to imprisonment for 13 months, the terms of imprisonment to run concurrently and to be suspended, conditioned upon good behavior during a probation period of five years and the payment of a

$7500 fine on the conspiracy count (R. 467, 512–513). The court of appeals unanimously affirmed.[1]

The substantive count upon which petitioner was convicted charged that he knowingly testified falsely on November 20, 1958, before a trustee in bankruptcy that neither he personally, nor any business venture with which he was associated, nor his "office overhead," received any of the money paid by the Texas Portland Cement Company ("Texas Portland") to Jamail for services purportedly rendered in handling partial payments on a debt owed by the company (R. 7–8). The conspiracy count charged that, in November and December of 1958, petitioner and Jamail had agreed that, when called in the bankruptcy proceeding, they would testify falsely regarding instances in which petitioner had acted in a manner inconsistent with his duties as director of Texas Portland—particularly with respect to the question whether petitioner had received compensation from the company for handling payments on the debt described in the substantive count (R. 10).

1. THE EVIDENCE AS TO COMPANY TRANSACTIONS

Petitioner, an attorney, shared his office space and his secretarial help with Jamail, an investment broker. In early 1957, petitioner aided Texas Portland in obtaining a $600,000 loan, payable in three yearly installments plus interest (R. 126, 401).

[1] Jamail was convicted of the same offenses, and received a similar sentence (R. 464, 467, 513–515). His conviction was upheld by the court of appeals (Pet. 22), and he has not filed a petition for a writ of certiorari.

The brokerage fee for obtaining the loan was divided between petitioner and Jamail (R. 409).

In July of 1957, petitioner was elected to the Board of Directors of Texas Portland (R. 115). When the first principal installment on the company's loan became due in January of 1958, the company was unable to meet its obligation. The lender, Bishop Nold of the Catholic Church, was persuaded to accept a check for $42,000, representing interest on the loan, and to grant a moratorium to the company under an arrangement whereby its invoices would be pledged to him in the amount of $2,500 per week. The Bishop, who had no bookkeeping facilities to handle such an arrangement, suggested that the collection of his funds be handled through petitioner's office (R. 126–129).

Kent Diehl, the president of Texas Portland, testified that petitioner agreed to collect the Bishop's funds only if the company agreed to pay $10,000 for the services in monthly installments of $833.33. Petitioner said that, because he was a director of the company, it would be better that he not receive the payments personally. The payments were to be made to Jamail (R. 132–134). The matter was discussed in petitioner's office in the presence of Jamail. The agreement between the three men was evidenced by a letter dated March 11, 1958, from Diehl to Jamail reciting that the $10,000 per year was to be paid "to you, not only [for] negotiating the loan but for your service in keeping the records and the payment to the Right Reverend W. J. Nold, in accordanee with our agreement" (R. 473). The records were kept by

petitioner, with his secretary doing the bookkeeping (R. 435–436).

The records of Texas Portland showed that it issued a check for $833.33,[2] dated April 3, 1958, to the order of Jamail, supported by a voucher showing that the check was in "payment for services rendered in connection with accounting and managerial services account of The Most Reverend W. J. Nold" (R. 69, 179, 477). The check was endorsed by Jamail and deposited to Jamail's account on April 3, 1958 (R. 476, 495). On the same day there was deposited in petitioner's bank account a check for $416.66, dated April 2, 1958, signed by Jamail and payable to petitioner, which bore on its face the notation "½ fee from Texas Portland Cement Company for services rendered". The check, identified by bank personnel, was endorsed by typewriter, "For deposit only to account of T. R. Mosheim" (R. 233, 235, 492).

Miss Julia Bradley who acted as secretary for both Jamail and petitioner, testified that she prepared the $416.66 check payable to petitioner upon Jamail's instructions that she was to write a check to petitioner for half of the $833.33 Texas Portland check to Jamail (R. 255–256, 264–265). She did not know whether petitioner saw the check at that time (R. 255–256). She credited the $416.66 on the ledger sheet as income to petitioner (R. 263). During the summer of the

[2] There was also evidence with respect to two other checks described in the indictment showing a complicated transaction by which company invoices, pledged in return for a $1,200 personal loan to petitioner, were redeemed through company checks made payable to Jamail.

same year, petitioner told her that she had credited the sum erroneously and that it should have been posted to Jamail's account on his running debt to petitioner for office expenses (R. 263–264). Petitioner explained to her "I am a director of that company, and I cannot take this money."

The evidence further showed that petitioner, Diehl and Jamail had guaranteed in writing the performance of an obligation of "Delmojam," a corporation which discounted the invoices of Texas Portland and made a profit therefrom (R. 143–150, 191–207, 486–488). Diehl testified that the corporate name was a contraction of the names of the three principals (Diehl, Mosheim and Jamail (R. 138)). A purchaser of due bills of Portland Cement, one Gross, testified that Delmojam agreed to repurchase the bills, that Mosheim had an interest in Delmojam, and that he had handled the entire transaction for Gross (R. 193–195).

2. THE TESTIMONY IN THE BANKRUPTCY PROCEEDINGS

On November 20 and 21, 1958, petitioner and Jamail were called to testify in proceedings for the reorganization of Texas Portland under the Bankruptcy Act.

Petitioner testified that he did not know why certain company checks, including one for $833.33, were paid to Jamail (R. 303). He denied that he ever agreed with Diehl to accept $10,000 per year as compensation for handling the collection of invoices for the Bishop's loan (R. 304–314). He was asked and replied as follows (R. 316):

> Q. I will ask you again, did you personally receive from Mr. Jamail any portion of the

money remitted to him by the Texas Portland Cement Company for his services?

A. No, sir.

Q. Did any business venture that you were associated in, be it corporation, partnership or sole proprietorship receive any portion of the compensation or any portion of the money received by Mr. Jamail for these services?

A. Not that I know of.

Q. Did the office overhead, that is your legal office, did it receive any portion of the money that was paid to Mr. Jamail by the Texas Portland Cement Company?

A. No, sir. The source of his funds used in paying his portion of the expenses, in other words, I don't know where he got the money. I am not passing on that, but as far as anything coming out of those proceeds to me or for my benefit or to any corporation or company in which I have a financial interest, no, sir.

Jamail testified that petitioner "never got a nickel"—"[not] a red cent" out of the payments made to Jamail on the $10,000 agreement. He said Diehl paid him to persuade petitioner to talk to the Bishop about arrangements for paying off the loan (R. 325, 326, 327, 329, 333). He denied that any portion of the money was used for the benefit of anybody else (R. 329).

Both petitioner and Jamail denied that petitioner had any interest in the separate corporation Delmojam (R. 295–298; 335, 337, 343). Both testified that the name was contracted from the words "Deliver

more jam"; both denied that the name was derived from the names Diehl, Mosheim and Jamail (R. 294-295; 336).

3. PETITIONER'S TESTIMONY AT THE TRIAL

Petitioner, taking the stand to deny that he had intentionally made a false oath (R. 407), corroborated in large part the testimony of government witnesses. He admitted that he knew that Jamail was receiving $833.33 a month from the company for work which he himself was doing (R. 425, 430, 435); and that, in June or July of 1958, he told his secretary that he was not entitled to receive the check for $416.66 and that she must therefore correct her records to show that it was received from Jamail for office expenses (R. 396-397). He also testified that he and Jamail had followed a standard arrangement for their joint business ventures whereby profits were split fifty-fifty, including the brokerage obtained for negotiating the loan in the first instance (R. 409, 419), as well as other transactions involving Texas Portland (R. 410, 419-420).

ARGUMENT

1. The principal issue that petitioner raises (Pet. 8-11)—whether the "two witness" rule of proof in perjury cases is applicable to prosecutions for making a false oath in bankruptcy proceedings (see *Hammer* v. *United States*, 271 U.S. 620, 626; *Gold* v. *United States*, 352 U.S. 985, 986)—is not presented in this case. For the court of appeals held (Pet. 20-21) that it was unnecessary to decide that question since "under the strict rule obtaining in perjury cases," "there was ample evidence as against both Mosheim

and Jamail to establish the falsity of the oath and the intent required." See *United States* v. *Marachowsky*, 201 F. 2d 5 (C.A. 7).

Petitioner has never denied (indeed his testimony at trial corroborated) the documentary evidence and the testimony of his secretary that a sum representing one-half of a monthly payment by Texas Portland to Jamail was in fact deposited to his account in April 1958 (R. 396). His argument that the proof was insufficient to show that he swore falsely, in November of the same year, that he had never received such funds, therefore must be that the government did not prove by two witnesses that he was aware of the significance of his receipt and thus of the falsity of his oath. But even in perjury cases the law does not require that subjective elements pertaining to the state of a man's mind—such as intent, knowledge, belief or recollection—be proved by direct testimony. Such matters must of necessity be established by circumstantial evidence, i.e., inferred from evidence as to what the defendant did or said. See the Government's Brief in Opposition, *Magin* v. *United States*, No. 411, this Term, certiorari denied, 364 U.S. 914. See also *United States* v. *Remington*, 191 F. 2d 246 (C.A. 2), certiorari denied, 342 U.S. 895.

In any event, petitioner's knowledge of the falsity of his oath was shown by the testimony of three witnesses, including petitioner himself. Thus, the court could conclude from the testimony of the company president (that petitioner arranged for the payments

to be made to Jamail because he believed that payments to him [the petitioner] would be improper conduct by a corporate director), that petitioner was not only aware of the source of the funds but expected to receive some of the money. Further, there was petitioner's own admission, corroborating the testimony of his secretary, that when he discovered in the summer of 1958 that money from this source had been deposited to his account, he instructed, not that the money be returned, but that the records be changed to reflect that the money was received as a payment on office expenses. This was direct proof that petitioner testified falsely when he denied that his "office overhead" or "legal office" had received money known by him to be a part of company funds compensating Jamail.[3]

2. There is no merit in petitioner's contention that he was improperly charged and convicted with Jamail under the conspiracy count. An agreement to testify falsely at a bankruptcy proceeding represents a serious obstruction to the proper conduct of such proceedings; the substantive provisions of 18 U.S.C. 152 were designed to prevent such obstructions. The evidence fully justified the trial court in concluding that these two men had agreed that their testimony before the trustee would coincide to the point of making identical false statements regarding their business ventures.

[3] Pressed at trial about his knowledge of the source of the funds, petitioner admitted (R. 455):

"Yes, I had known. I wasn't thinking about it at the moment; they weren't in my mind at that particular time. Why I answered it that way, I am going to be honest with you, Judge, I don't know. I just don't know."

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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